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ABSTRACT

In 1947 Nebraska established a unique Court of Industrial Relations to resolve disputes between government agencies and public employees. The court's five part-time judges are appointed by the governor to six-year terms, and the court's operating costs are covered in the state budget. Even so, costs to litigants may be higher than necessary. The consistent quality of the court's judgments is partially offset by the court's tendency to consume more time than is typically consumed in similar cases in other states. While the great majority of arbitration cases nationally involved postcontractual disputes, most of the Nebraska cases have involved disputes over recognition of bargaining agencies, the necessity to bargain, and questions of compensation, prior to contract agreement. Methods established to alleviate these problems have not been promoted adequately and so have proved unsuccessful. Court routines and techniques for ensuring consistency in rulings are discussed and recommendations for improvement in court operations are provided. (Author/PGD)

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NEBRASKA'S COURT OF INDUSTRIAL RELATIONS:

UNIQUE IN

PUBLIC EMPLOYMENT ARBITRATION

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Introduction and Facts

Labor relations includes those tensions and strains between parties having views which differ, philosophically, on economic matters, and upon other matters and bases, too. Management and labor do have such differences. Most--but not all--of the nation's states have set forward routines by which such strains may be relieved, by which disputes may be settled. Nebraska has such a set of routines, and for public employees--labor--those routines all relate to the state's Court of Industrial Relations. The Court is unique in the nation, following the equally singular circumstance that all electric utility industry employees work for governmental units operating as public power corporations.

Although the Court of Industrial Relations (CIR) was created by the state legislature in 1947, its antecedants were evident earlier in lawmaking considerations. The 1947 statute (LB 537) was intended to diminish the

possibilities of industrial disturbances which would impact upon governmental, i.e., public, services. This section of Nebraska's labor law did not undergo functionally significant change until 1969. Intended as an alternative to the strike for public employees, as a "pressure release valve," LB 15 allowed public employees to enter into collective bargaining in 1969. It also enlarged the size of the CIR from three to five judges, designating it as the agency to which all public employee disputes should go for settlement. The Court has operated with but little statutory change since 1970; however, the CIR has developed its own set of rules, the most recent of which was announced in May, 1978. The rules, increasingly, make the CIR more like typical state public employment relations boards, in both procedure and substance.

Several questions will be explored in this brief analysis which relate to the CIR. Specifically, the following five questions will be addressed.

1. What does the service cost?
2. How does the Court arrive at decisions?
3. How long does the Court take to deliver a decision?
4. What quality decisions are rendered?
5. What kinds of cases does the Court hear?

The judges, appointed for a six year term by the governor, are compensated at the rate of $120 per day. The plaintiff and defendants pay no judge's fees. By statute, they are to be "representative of the public." They have, with but one exception, all been attorneys. The job is obviously part-time. The level of participation by the judges has been progressively diminishing. Originally, all three judges sat in a hearing. Later, the custom was that three of the five would sit as a panel of judges. By the mid-seventies, a single judge sat, circulated the exhibits, testimony, and his draft opinion to two other judges; and upon securing consensus, a decision could be pronounced. Now, the judges may appoint a hearing examiner who takes exhibits, testimony, and information

generally which is transmitted to the presiding judge. The hearing officer's opinion is circulated to three CIR judges and they determine whether to adopt the possibilities of industrial disturbances which would impact upon governmental, i.e., public, services. This section of Nebraska's labor law did not undergo functionally significant change until 1969. Intended as an alternative to the strike for public employees, as a "pressure release valve," LB 15 allowed public employees to enter into collective bargaining in 1969. It also enlarged the size of the CIR from three to five judges, designating it as the agency to which all public employee disputes should go for settlement. The Court has operated with but little statutory change since 1970; however, the CIR has developed its own set of rules, the most recent of which was announced in May, 1978. The rules, increasingly, make the CIR more like typical state public employment relations boards, in both procedure and substance.

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Table I

CIR Cases,

Identified by Year and Types

Fiscal Year	Total Cases Filed	Type I: Employee Representation		Type II: Impasse		*Miscellaneous	
		Election Ordered	No Election	Public School Teachers	Other Public Employees	Public School Teachers	Other Public Employees
1948 thru 1969	22	1	1	0	10	0	10
1970	4	1	1	1	0	1	0
71	20	1	3	7	2	5	2
72	20	0	3	6	0	2	9
73	27	9	6	10	0	1	1
74	21	5	3	8	0	5	0
75	32	9	6	8	6	3	0
76	32	12	2	3	5	1	9
77	43	12	0	12	7	1	11
78	47	22	1	2	13	1	8
Total	268	72	26	57	43	20	50

*Miscellaneous includes unfair labor practices, contract grievance, declaratory judgments, and so on.

Source: Adapted from Arnold; RCO, UNO (1978)

circulated the exhibits, testimony, and his draft opinion to two other judges; and upon securing consensus, a decision could be pronounced. Now, the judges may appoint a hearing examiner who takes exhibits, testimony, and information generally which is transmitted to the presiding judge. The hearing officer's opinion is circulated to three CIR judges and they determine whether to adopt the opinion or not. Hearings for settlement occurred before a hearing examiner in 1977, the year in which the CIR promulgated the rule, and have continued in 1978.

Some of the reasons why the participation of the appointed judges is occurring at a reduced level and in a new format can be seen from the information in Table I. Although the CIR now has its own clerk, publishes its own reports, has increased from three to five judges, and so on, it is still a part time Court, and its load has increased dramatically. A recently enacted lid bill and a CIR decision--disallowing comparability of taxpaying ability in settlements--indicate that the load will continue to increase.

User Impressions and Facts

To understand this state agency, facts and impressions have been gathered. Some of the facts have already been revealed. Others will be, along with impressions revealed by users of the Court, and finally some recommendations will be developed. Facts and impressions, then, constitute a dual information base from which analysis and deduction will be made. Interviews were conducted with a chance selection of several people who use the CIR, structured only to assure some balance of interests as between public employers and public employees.

With regard to costs, the fees to judges, as well as the Court's office operating costs, are paid from a state appropriated budget for FY 1978, $112,000.

Only attorneys may present to the court.* Their fees, costs of expert witnesses, costs of exhibit productions, and so on, are parts of the total cost which comes to both plaintiffs and defendants.

The Nebraska State Education Association (NSEA) is a large user of the CIR services, active in every one of the more than sixty suits brought from its various locals. Case costs generally run about $2,000 for the NSEA, but occasionally are much more. This low cost is possible because of an extended experience in case preparation, and through the use of "in house" personnel. For the local board of education, typically the defendant in those suits, the cost items may be similar, but the magnitude differs, substantially. A local board should expect total costs of $4-5,000, with a strong possibility that costs might run to $9-10,000. Similar costs should be anticipated by any other public employer.

Cases may be appealed to the state supreme court. As of August, 1978, thirty-one of the 268 cases in Table I have been appealed, a little over eleven per cent. Of that group, twenty cases have been appealed in the years 1976-77-78, a sharp increase. Appeals carry their own cost burden. It is apparent that costs of access to the state supreme court might give pause to both the employee group and to the employing board or council. For a given case, the total combined cost for both sides might be as little as $6,000, or might run in excess of $15,000. In 1971, the average total charge for arbitration, as indicated by records of the Federal Mediation and Conciliation Service (FMCS) was less than $600 per case. (This figure is from the realm of grievance arbitration, private sector, which might well be less complex than many of the

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*Court rules state that individuals may represent themselves, but practically, that is not a rule which affects the other rules about representation through attorneys, only.

cases heard by the CIR.) Examination of public employment interest arbitration cases for 1976 and 1977 in the American Arbitration Association offices revealed typical total costs charged by the arbitrator of $600-1,000. For this "vendor's fee" the disputants--who are not litigants--get two important advantages when compared to the CIR. First, freed of judicial routines, the obligations for preparation and representation are greatly reduced and costs are likewise lowered. Second, the time lapse from hearing to award is much shorter--resolution is quicker.

As a large user of CIR services, the NSEA has installed a routine which has cost control as one aspect. Although any Nebraska teacher's local may, of its own volition, carry a suit to the CIR, and assume all costs, none has. To do so would be to forsake cost bearing by the NSEA. An internal review board examines each local's complaint and advises, "Yes, we will go to the CIR and support your case;" or, "No, we will not support you, but you may still wish to go of your accord, and pick up your own costs." Obviously, such a review serves several functions, but one is cost control, and the existence of such review must have a reduction effect upon the number of cases which teachers, as one category of public employees, are willing to bring to the attention of the CIR. Only through a special levy upon members could most locals support independent action before the CIR because preparation and representation costs are high.

The CIR arrives at decisions by way of judicially styled routines. That is, the routines are formalized, written, with procedureal checks, and re-checks. Petitions, pleadings, certificates, briefs, and so on, constitute the grist for the CIR mill. The proceedings for the Court vary by type of case, and have been codified in the "Rules of the Court of Industrial Relations." Amended and updated periodically, the rules specify procedures for placing a case on the Court's docket, and based upon applicable statutes, delineate procedures which are appropriate for several different kinds of disputes, as each might be

heard by the Court. The rules stipulate that all details of procedure which are not specific to the CIR must be in accord with the statutes of the state. The Clerk of the Court is empowered to attend many of the above items, and to calendar hearings, and set cases for trial.

The parties to the dispute appear before the Court as adversaries; i.e., as plaintiff versus defendant. Each case is presented through counsel. Evidence and testimony are taken, the general dimensions of which may have been mutually agreed to at a prehearing conference. Case determination is by a panel of three judges, but as mentioned previously, this does not mean that a panel of three judges sits for the hearing, although that may happen, too. Characteristically, the panel functions after the hearing, and then on a mail circulation of materials pertinent to consideration of the case.

Written decisions are delivered by the Court, and customarily end with some order for remedy of the dispute. For example, in the case of the Seward Education Association v. Seward School District (#34:1971), the Court decreed as follows:

> The Plaintiff and Defendant are ordered forthwith to undertake good faith negotiations in regard to the determination of salary schedule, professional leave, and professional organizations (related to subject area), noon duty, dress code, and school calendar for the 1971-1972 school year.

Appealed to the Nebraska Supreme Court (188 Neb. 772:1972), the CIR order was upheld.

The above brief example of procedure and single example of the Court's writing style do not fully convey the style of the CIR. In statute it is designated as a court. In the latter 1960's the state legislature considered establishing a public employee relations commission, but did not. Instead, it expanded the concerns of the CIR. Conceptually, the CIR is an agency of final, binding arbitration for all labor disputes in the public employment sector. Examination of the decisions clearly indicates, however, that the CIR

perceived itself as a court, and only secondarily, as an arbitration board. Some of the characteristics which lead toward that conclusion include the length of the decisions. In the first two decades of the Court life, decisions running to forty or fifty pages were delivered. In the case of IBEW Local 507 v. Board of Public Works, Hastings, Neb. (#17:1967), the decision, as recorded in the CIR Reports, runs 113 pages. The writing style of the Court is also instructive, abounding with such legalese as forthwith, heretofore, aforesaid, and so on. From 1948-68 the Court heard only twenty cases; but compared to today, it lavished attention upon each, and set the functional style for the future. That is, the CIR is a court, which as a result of its functioning may render arbitration service. Its procedures and decisions are bound in the protocol of legalism, an inferior court from which appeals may be made to the state superme court.

How long does it take for the CIR to decide a case? Parties to a dispute are generally eager for an earliest possible settlement, and the time performance of the CIR merits attention. Examination of the volume of the Courts' business, as can be seen in Table I, revals a great case load growth occurring in the seventies.

How does a bargaining impasse appear on a timeline? Teachers comprise the largest single occupational category using the Court. Under the Teachers Professional Negotiations Act, for example, at the time that one side or the other rejects the fact finder's recommendation, the way is opened to the CIR. Initiative rests with the rejecting party. A petition must be filed with the Court, conforming with its rules. A copy of the petition is mailed to the adverse party. Mediation and/or a pre-hearing conference may be scheduled. A docket number is assigned and the clerk puts the hearing on the calendar. The hearing occurs and a decision, endorsed by a majority of the designated judges, is issued.

In 1974, the legislature spoke to the timing of the Court, and enacted a "90 day rule." The rule (R.S.N. 48:813) stipulated the days of time lapse at each step, and called for an order to be issued "within thirty days after each such hearing." However, the Nebraska Supreme Court (196 Neb. 693:1975) held that the legislators were directing and not mandating, and relieved the CIR of those time constraints. Presently, time lags of one year or more from the filing of the petition to the issuance of a decision are occurring. Examination of the docket indicates that the lag is not being shortened. Partially, this impression is a result of the CIR's drive to clear older cases from its docket; partially, it is because some few cases are still in an extended time frame.

Not incidentally, a characteristic of CIR decisions bears upon the question of time lapse. All decisions are dated at the time of issuance. Some decisions include the docketing time as well, so that a reader may readily know the time lapse from when the case was placed on the docket to the time of the decision. Many decisions omit the time of docketing, so a reader may not know, from reading the case, what its rate of progress was as it was handled by the Court.

Reasons for the time lag are several, but include the following:

1. Part time judges are, frequently, unable to adjust their own work schedules to early hearing dates. Pay at the rate of $120 per day does not motivate judges whose regular work compensation is well beyond such a fee.

2. The judges cannot be stimulated by the clients, for they are not working for the courts' clients. (The CIR judges are in a very different posture from the arbiters of the AAA and FMCS who work on public employee disputes in every other state)

3. The volume of work has greatly increased in the seventies, a consequence of the expanded area of concern put upon the CIR by the legislature in 1969.

4. The judicial operational style is formal, meticulous, and time consuming, contributing in its own way to the extension through time of each step in the dispute settlement process.

Current volumes of Labor Arbitration Reports were examined, and the few bargaining impasse cases involving public boards were noted. Ninety days was an uncommonly long outside limit from point of impasse declaration to point of decision. Records of the FMCS indicated that about fifty days elapse between hearing and award. A sample from the records of the AAA revealed that over fifety per cent of the public employment dispute awards were written within ten days of the end of the hearing.

Interviewees who contributed their varied impressions about the Court agreed upon one thing. Time. They all noted that the judges were "busy people, people in demand, elsewhere;" and so on. The interviewees agreed that settlement takes too long, and that prolonged indecision is, itself, a contributor to hostility between the adverse parties. In the sense that the Court is an agency for final and binding arbitration, and in the sense that arbitration has as its aim the avoidance of disruption and the encouragement of productive relationships, the CIR time lag is an obvious problem.

What about the quality of decisions which are rendered by the Court? Of the 221 cases handled through FY 1977, only a few were dismissed with dispute settlement occurring before the Court acted. Of the more than 200 decisions made by the CIR, twenty-three have been appealed to the Nebraska Supreme Court. Simplified for tabulation purposes, it can be stated that four are now pending, twelve were affirmed, two decisions were modified, and five were reversed. Nearly ninety percent of the CIR decisions, then, were of sufficient legal and logical substance, and of such apparent impartiality, that the litigants accepted them, rather than try for reversal through appeal.

The question of assessment of quality by individually examining each, or some specific decisions, proved too difficult for this research endeavor. Interviewees held opinions on the matter, but recognized the practicality of their situations, too. That is, realizing that they might come before a judge

again, as either plaintiff or defendant, they chose the prudent course and would not discuss those decisons which they perceived to be of low quality--ambiguous, contradictory, and so on--but did identify some decisions which they considered to be outstanding examples of clear logic and good writing. Unlike every other state, Nebraska disputants may not choose other arbitrators as subsequent disputes arise. (This situation is a reflection upon human nature, and certainly not upon the judicial nature of the CIR).

It is feasible to approach the question of quality by way of another question, viz., Is the court consistent in the application of stable, predictable criteria for judgment? The bulk of the cases have centered upon aspects of bargaining. Very few cases have involved contract management. Taking its cue from N.R.S. 48:818, the Court decides on the basis of comparability to prevalent conditions. This is the national norm for interest arbitration. Currently, in Nebraska, four criteria are applied to school district disputes, with items one and two most important. Slight adaptations allow the applications of these or similar criteria to other governmental jurisdictions and boards:

1. Student enrollment - no inclusions of less than half nor more than double the size of the district at dispute
2. Geographical proximity - no inclusions from more than fifty miles distant, but treated flexibly
3. Community of interest
4. Athletic conference, and scholastic and academic contacts.

The prevalent conditions on the item(s) under dispute among the govermental units constituting that group which is labeled as comparable may be evaluated, differences noted, and a decision made. Frequently, the plaintiff and defendant present comparable groups consisting of different units, a reflection of the differing emphasis and viewpoints of the litigating parties.

The criteria are not a perfect fit for all disputes, leaving room for honest argument over their most suitable application. For example, some school

districts, by their large or small size, make a strict application of Criteria #1 or #2 impossible; i.e., insistence upon application would mean no comparison, and comparison is the heart of the process.

As whimsy and unpredictability would surely be characteristic of low quality in decision making, the CIR has established or accepted generally known criteria. Application has been made in each case as seems appropriate from the conditions and presentations. By such applications, whimsy is out, stability is in, and quality is up.

One CIR quirk merits attention, for it bears upon the quality of decisions. When impasse occurs because of salary disputes, the employing board of education is likely to be in a posture of narrow interest, and that focused upon the question, What will the total package cost? This narrow focus is likely because the impasse resolution effort and initial budget development most frequently are parallel interests on the calendar. That is, they occur at the same time for school districts. Nearing final budget hearing, and getting the news of a CIR decision, the board will want to know the cost of the total package, for that translates into tax levies. With that information at hand, a board may decide to appeal to the state supreme court with the idea that it can prove the settlement was too high.

Unfortunately, the CIR uses the term 'total package' but within a specialized definition in which some costs are excluded. For example, it excludes social security from its calculations of total package costs. The reality is, however, that those are costs for which, like any other salary augmentation, revenue must be raised. The unwary board, or one with an attorney who is not alert, may misunderstand, and miscalculate. To the degree that clarity of communication is part of the quality of decisions, the CIR introduces some needless ambiguities on occasion.

What kinds of cases does the Court hear? Some characteristics emerge from scanning the case titles. First, the bulk of the action is brought by employees, as they, the plaintiffs, sue employing boards or councils, the defendants. Of the 268 cases docketed through FY 1978, in only two were public boards as the plaintiffs. Second, most of the action involved unions or associations, not individual employees. Of that group of 268 cases, only six involved litigation on behalf of individual employees. That is, in only six cases were the litigants identified as individuals, rather than unions or associations.

A cursory reading of cases revealed that through 1975, the great preponderance centered upon disputes which occurred prior to contract agreement and ratification, interest arbitration. They involved disputes over recognition, the necessity to bargain, and broadly, compensation disputes. In the past three years, the Court has heard forty-nine cases devoted to questions of election for representation. Only a few cases beyond those six individuals who were grieving contract implementation included some dispute of an existing contract. This is in sharp contrast to the national scene, where almost ninety per cent of the arbitration effort is devoted to disputes which arise after a contract has been signed and implemented. Such an out-of-balance circumstance is a strong indicator of a likelihood of change in Nebraska.

Conclusions and Recommendations

The user impressions, the history of the Court, and some facts about its performance lead to the following five succinctly stated conclusions.

1. The quality of decisions has been well supported by consistent application of reasonable judgment criteria.

2. The cost of public employment arbitration, through this Court, makes it at least as high as anywhere else in the nation.

3. The time consumed in dispute consideration is, likewise, far beyond what is needed, typically, for comparable cases in every other state.

4. The types of cases brought up for arbitration by public employees in Nebraska are out of character with the types most frequently arising on the national scene.

5. With only 246 cases filed over the last nine year span, and most of those centered upon bargaining, many disputes are either endured by employees, resolved locally, or they do not arise--a characteristic of brief contracts.

Some recommendations have been developed upon analysis of this brief study of the CIR. Some are a consequence of combining information. For example, given the high cost of the arbitration service, and the time lag involved, it is surely no surprise that Nebraska's public employees, comparatively speaking, seldom seek the assistance of the only available outside neutral--the CIR--in dispute settlement.

1. The cost of the CIR is too high. This can be addressed by transferring costs to some source other than the clients, a suggestion which doesn't seem terribly likely. Or, another impasse resolution service, with a reduced cost, might be created. In fact, this may have been addressed by the CIR with Rule #17 (9-14-76) which allows for mediation as an intermediate step between impasse and fact finding, or at other points of bargaining disputes. If that mediation is conducted at the fees level suggested by the American Arbitration Association, the service could frequently be performed for a few hundred dollars to the concerned parties--who would be disputants but not litigants.

2. The time lapse in CIR service is discouraging. This could be addressed by extending the CIR budget and hiring at least one full time judge. It can also be addressed by use of the newly established mediation and conciliation service, an expediting service which does not demand new levels of legislative appropriations. Although relatively new, that service has not been actively promoted by the CIR, and so, is not widely known (Ten months after the rule was announced, three major metro area negotiators were asked about it; it was unknown to all. Eighteen months after mediation became an alternative techniques, the CIR revealed that it was, still, an unused service.)

3. The dual problems of cost and time lag may not be adequately addressed by a mediation and conciliation service, either. Largely unknown by possible users as a low cost, high speed option, mediation has had no trial in Nebraska. Too, it is advisory, only. With settlement a necessity, the increasing number of public sector disputes indicates a need for reconsideration of the establishment of a public employees relations board, under which graduated resolution techniques would be available, leading toward some kind of final, binding arbitration, short of litigation.

The scope and volume of public bargaining in Nebraska is extending. Occasionally, arguments have been made that the public-private differentiation is not very sophisticated. Those arguments all overlook the public-private employer dissimilarities. But, it is real, it reflects the political world, and the contracts which are becoming more complex, are real, too. The number of disputes in Nebraska will very likely rise, conforming, more and more, to the prevailing national pattern. Given the problems with which the CIR is now struggling, it is apparent that user dissatisfaction will probably rise. The long history of settlement of Nebraska public employment disputes, short of strikes, may not continue. Or, the quality of CIR decisions may falter.

It is not the burden of this paper to identify those structures for public employment dispute resolution which should be adopted; many are now available, and new ones are developing. It is time for consideration, revision, modification, and selection, however, to assure adequate "pressure relief" structures for Nebraska's public employers and public employees.